JOHN STRAIN
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

GALEN W. MOHR
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

FRANCIS W. TIEF
v.
ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

WALTER SNELLMAN
v.
ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-149-A, 92-158-A, 92-161-A, and 92-164-A — Decided December 18, 1992

Appeals from decisions adjusting rental rates for leases of Indian land.

Affirmed.

1. Appraisals--Board of Indian Appeals: Generally--Indians: Lands: Fair Rental Value--Indians: Leases and Permits: Rental Rates

   The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

2. Appraisals--Indians: Lands: Fair Rental Value--Indians: Leases and Permits: Rental Rates

   An appellant who challenges a Bureau of Indian Affairs rental adjustment for a lease of Indian land bears the burden of proving that the adjustment is unreasonable.

3. Appraisals--Indians: Lands: Fair Rental Value--Indians: Leases and Permits: Rental Rates

   A determination of fair annual rental for a lease of Indian land should be made in accordance with generally accepted appraisal principles.

4. Board of Indian Appeals: Generally

The Board of Indian Appeals normally will not consider arguments raised for the first time in an appellant's reply brief.

APPEARANCES: Appellants, pro sese; Colleen Kelley, Esq., Office of the Regional Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants John Strain, Galen W. Mohr, Francis W. Tief, and Walter Snellman seek review of decisions issued by the Portland Area Director and the Acting Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming increases in rental rates for leases held by appellants. 1/ Because the four appeals raise similar issues, they are consolidated for purposes of decision.

For the reasons discussed below, the Board affirms the Area Director's decisions.

Bachground

Appellants hold leases of residential/recreational lots in the Raymond J. Paul Waterfront Tracts, within Government lot 3, sec. 34, T. 34 N., R. 2 E., Willamette Meridian, Washington, on the Swinomish Indian Reservation. 2/ The leases held by Strain, Mohr, and Snellman are each for a term of 25 years. Each lease contains a provision at section 7:

> RENTAL ADJUSTMENT. --The rental provisions in all leases which are granted for a term of more than five years and which are not based primarily on percentages of income produced by the land shall be subject to review and adjustment by the Secretary at not less than five-year intervals in accordance with 25 CFR [Part] 131 [now Part 162]. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by this contract or the contribution value of such improvements.

This same requirement is included in the regulations governing leasing of Indian land. 3/ See 25 CFR 162.8.

1/ The decisions appealed by Strain and Mohr were issued by the Portland Area Director on Apr. 3, 1992. The decision appealed by Tief was issued by the Acting Portland Area Director on Apr. 13, 1992. The decision appealed by Snellman was issued by the Acting Portland Area Director on Apr. 7, 1992.

2/ Strain holds lease 6348 for lot 26, Mohr holds lease 6222 for lot 27, Tief holds lease 7774 for lot 22, and Snellman holds lease 7714 for lot 19.

3/ Tief's lease is missing from the record. However, a lease assignment is included, showing that the lease will expire on June 30, 2007, and that

In September 1991, BIA prepared appraisals to be used in adjusting appellants' rental rates. The appraiser's rental adjustment memorandum for Strain's lease states in part:

> RENTAL ESTIMATE: Residential-recreational lots are not typically rented; therefore, direct comparison with rental rates for similar lots was not possible. An alternative method of estimating rental is one in which an appropriate rate of return is applied to the estimated market value of the subject property. The market value for the subject property is estimated as if it were offered on the open market to persons generally. Sales of properties similar to the subject provide a sound basis for an estimate of value. Therefore sales information has been gathered, confirmed and analyzed as the basis for an estimate of market value for the subject. A data base of 34 sales occurring during the last 5 years was analyzed using a multiple regression program to derive appropriate adjustments for differences in characteristics of the sales studied. Sale prices were analyzed on a price per site basis considering date of sale, size in FF and depth, water frontage, access, utilities, view and neighborhood as described [i.e., residential-recreational]. * * *
>
> RATE OF RETURN: Studies have been made by the Portland Area Appraisal Office regarding leases on various types of real estate during the last several years. Estimates for rates of return vary from 4% to 12%. Generally rates for agricultural lands and savings at S&L's are at the lower end of the range with commercial properties and industrial properties at the upper end of the range where recapture of improvements is a factor. The unimproved subject site would most likely command a "rate of return" between these extremes, say 9.5%.
>
> CONCLUSION: Applying the 9.5 percent rate of return to the $28,700 estimated Fair Market value of the subject indicates a current fair annual rental value of, say, $2,725. It is recommended that the annual rental be adjusted to this amount. [4/]

Similar appraisals Were prepared for the other appellants' leases.

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fn. 3 (continued)
it was assigned to Tief on June 26, 1989. It is clear from the assignment that the lease has at least an 18-year term. The Board assumes that Tief 's lease includes a provision requiring rental adjustment at 5-year periods. Even if it does not, his lease is subject to the regulatory requirement for rental adjustment.

4/ Attached to the rental adjustment memorandum, as it appears in the administrative record, is a summary analysis table and a sales comparison table in which the lot leased by Strain is compared to four sales. Also attached is another table analyzing 34 sales on the Swinomish Reservation between February 1987 and July 1991.

By letters dated November 18, 1991, the Superintendent, Puget Sound Agency, BIA, informed appellants that their annual rental rates would be adjusted as follows: (1) Strain - from $1,510 to $2,725, (2) Mohr - from $1,590 to $2,775, (3) Tief - from $1,377 to $2,710, and (4) Snellman - from $1,490 to $2,710. The Superintendent's decisions also required appellants to increase their surety bonds to cover the increased rentals.

Appellants appealed the Superintendent's decisions to the Area Director, who affirmed them. Appellants then filed these appeals with the Board. All appellants filed briefs and/or statements of reasons. The Area Director also filed briefs.

Motions to Require Bonds

The Area Director filed motions requesting the Board to order Strain, Tief, and, Snellman to increase their surety bonds to cover the increase in rentals, as had originally been ordered in the Superintendent's November 18, 1991, decisions. Strain and Tief subsequently notified the Board that they had increased their bonds in accordance with the Area Director's request. Snellman objected, contending that a requirement to post a bond covering increased rental while the matter is in dispute would be premature.

The Board has authority under 43 CFR 4.332(d) to order the posting of "an appropriate bond * * * to protect the interest of any Indian, Indian tribe, or other parties involved." The Board has not ordered Snellman to post a bond during the pendency of this appeal. However, given the result reached in this decision, Snellman will be required to increase his bond in order to comply with 25 CFR 162.5(c). 5/

Discussion and Conclusions

[1, 2] The Board's standard of review in rental adjustment cases is well established. The Board has recognized that the determination of "fair annual rental" requires the exercise of judgment and that reasonable people

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fn. 4 (continued)

The Area Director states that "[t]he four comparable sales were chosen because they were either recent sales in the same section, township and range * * * or because they were sales of a similar size with water frontage" (Area Director's Answer Brief in Strain Appeal at 3).

5/ 25 CFR 162.5(c) provides:

"Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:

"(l) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

"(2) The estimated construction cost of any improvement to be placed on the land by the lessee.

"(3) An amount estimated to be adequate to insure compliance with any additional contractual obligations."

may differ in their calculation of "fair annual rental." Navajo Nation v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 179, 185, 94 I.D. 172, 175 (1987). The Board does not substitute its judgment for BIA's. Rather, it reviews a rental adjustment to determine whether it is reasonable, that is, whether it is supported by law and evidence. The Board overturns a BIA determination only if it finds the determination unreasonable. E.g., Wapato Orchard Partnership v. Portland Area Director, 18 IBIA 254, 255 (1990). The burden of proving a rental adjustment unreasonable is on the person who challenges it. Wapato Orchard Partnership, 18 IBIA at 255-56.

[3] Except in certain specified circumstances, Indian lessors are entitled to receive fair annual rental for their property. See 25 CFR 162.5(b). In order to be fair to both the lessee and the Indian landowners, a determination of fair annual rental should be made in accordance with generally accepted appraisal principles. See Navajo Nation, 15 IBIA at 187, 94 I.D. at 176.

The Board has held that the basic methodology employed by BIA here--use of sales data with a rate of return, where comparable rental data is unavailable--is a reasonable means of determining fair annual rental. Navajo Nation, 15 IBIA at 194, 94 I.D. at 180; Wooding v. Portland Area Director, 9 IBIA 158, 160 (1982).

All appellants contend that their rental adjustments were excessive. However, the fact that a rental adjustment results in a substantial increase does not prove that it is unreasonable. It might simply indicate, for instance, that previous rental rates were unrealistically low. Or it might reflect a true increase in the market. Accordingly, appellants' bare allegations that their rental adjustments were excessive is insufficient to carry their burden of proving that the adjustments were unreasonable.

All appellants also contend that the rental adjustments for similar lots were inequitable, with some lessees receiving much smaller increases than others. They object in particular to the fact that two lessees, who each hold leases covering two adjacent lots, received a smaller increase or, in the words of appellant Mohr, a "group discount." The Area Director argues that "[i]t is a common occurrence that leasing property in large quantities reduces the per acre price. Thus, it could be expected that a lease containing twice as much property would rent for less per acre than [Mohr's]" (Area Director's Answer Brief in Mohr Appeal at 2). It appears also that the lower increase in these cases resulted, in part at least, from a change in BIA appraisal practice. That is, whereas BIA had formerly appraised on a lot-by-lot basis, it had now decided that appraisal on a lease-by-lease basis was the better methodology.

Appellants contend, in essence, that BIA erred in appraising the adjacent lots together. But the other lessees' rental adjustments are not on appeal here. Even if appellants are correct, and BIA erred in calculating the other lessees' rental adjustments, it would not help appellants' cases. Appellants must show that BIA's calculation of their own rental adjustments was unreasonable.

Further, the fact that the amounts of rental adjustments varied among lessees does not mean that any of them, or appellants' adjustments in particular, are unreasonable. Because each lease was appraised individually, taking into account the particular characteristics of the property leased, variations in appraised value are to be expected. BIA's appraisal methodology would appear to be a more accurate methodology than one which would have arrived at identical values for all lots in the area. The Board finds that appellants have not shown that their rental adjustments were unreasonable by virtue of the fact that there were variations in the adjustments for similar lots.

Appellant Tief makes two arguments not made by the other appellants. He contends that BIA failed to take into consideration the loss of land from his lot because of a road construction project. The Area Director responds that the appraiser was aware of the road construction project but concluded that, once construction was completed, there would be no loss of property. Tief has not replied to the Area Director's statement. Therefore, the Board finds that, in making this argument, Tief has failed to show that the Area Director's decision was unreasonable.

Tief also argues: "Assessment for sewer and water improvement remains uncertain. However, this is most certainly an important element of any appraisal. The Swinomish Tribe has informed leaseholders that plans are still continuing for this expensive improvement" (Tief's Notice of Appeal at 1).

BIA did not err in omitting the proposed future improvements from its appraisal. And Tief was clearly not harmed by this omission. In fact, if BIA had taken the proposed improvements into consideration, the appraised value of Tief's lease would presumably have been higher. The Board finds that, in making this argument, Tief has not shown that the Area Director's decision was unreasonable.

Appellant Snellman contends that BIA appraised lots with improvements at higher values than unimproved lots, in violation of paragraph 7 of the leases. However, his analysis of this alleged error actually refutes his own argument. The examples he gives are the adjusted rentals for leases covering two adjacent lots. See discussion above. He first assumes that the appraised rental value for each of these "double" leases may be divided in half to arrive at the rental value for each lot. He then compares the supposed rental value for one lot in each of those leases to his own appraised rental value, arguing that his own is higher because his improvements were included in the appraised value for his lease. The irony of his argument is that he notes that each of the double leases has an improvement on one lot but not on the other, yet he assigns equal values to the improved and unimproved lots within each lease! Aside from its illogic, appellant's argument here is sheer speculation. He has produced absolutely no evidence that BIA has violated paragraph 7 of his lease by taking his improvements into account in adjusting his rent.

Snellman also argues that 9.5 percent is not an appropriate rate of return to apply in this case because it is not consistent with the economic

reality of the area; not consistent with the tax base; and, according to his calculations, not consistent with the rate of return on other trust property in the area. Again, however, appellant's arguments are speculative and largely irrelevant. He has not shown that BIA's method of determining an appropriate rate of return was unreasonable.

Next, Snellman contends that BIA did not take into account the facts that the property he leases is subject to land sloughing and that a flood and land slough had occurred in 1990; that a car cannot be driven directly to the cabin but must be parked 147 feet away at the top of a hill; and that the buildable site on the property is small because the land is sloped.

The Area Director contends that "[t]he appraiser was aware of the sloughing that occurred in 1990, but because the damage to theproperty had been repaired by the time of the appraisal, he concluded it did not affect the value of the property" (Area Director's Answer Brief in Snellman Appeal at 3). Further, the Area Director argues, the appraiser was aware of the lack of direct vehicular access to the cabin but did not consider it to warrant a reduction in the fair rental value. Id. Finally, the Area Director stated in his decision that the appraiser considered the lot to have a usable depth of 208 feet 6/ (Area Director's Decision at 3).

While Snellman clearly believes that the rental value of his lease should be reduced because of factors he identifies, and disagrees with the BIA appraiser's analysis of the property, he produces no evidence that, as a matter of appraisal practice, it was unreasonable for BIA to decline to make allowances for these factors.

[4] Snellman filed a reply brief in which, for the first time, he challenges the regression analysis methodology employed in the BIA appraisal. 7/ The Board normally declines to consider arguments raised for the first time in an appellant's reply brief. Under the Board's regulations, opposing parties are entitled to an opportunity to respond to the appellant's arguments. They are deprived of this opportunity when the appellant fails to raise an argument until he files his reply brief. Tiger Outdoor Advertising v. Eastern Area Director, 22 IBIA 280 (1992); Joint Board of Control v. Acting Portland Area Director, 22 IBIA 22, 28 (1992), and cases cited therein.

6/ The map attached to the rental adjustment memorandum shows the actual depth of the lot to be 211.04 feet.

7/ Snellman submits an Aug. 28, 1992, statement from an Associate Professor of Mathematics at Western Washington University, who states that he analyzed the 34 sales "using the MINITAB statistical package at Western Washington University, and the results did not agree with those indicated in the [BIA rental adjustment] memorandum." He concludes: "1. The coefficients used in the memorandum were not obtained using multiple linear regression techniques," and "2. Use of multiple regression on this data base is not warranted."

Significantly, the Associate Professor makes no claim to expertise in the practice of appraisal.

In this case, Snellman contends that, because BIA did not send him a copy of the appraisal earlier, he had no opportunity to review it until he received a copy with the Area Director's brief. The Board finds this contention disingenuous. Snellman does not allege that he ever sought a copy of his appraisal from BIA. 8/ He did not seek a copy from the Board after BIA submitted the administrative record, item 6 of which was identified as a September 18, 1991, rental adjustment memorandum. Snellman was clearly aware that BIA prepared appraisals in conjunction with rental adjustments, as is evidenced by the fact that he submitted a number of appraisals for other properties with his notice of appeal to the Board.

If Snellman did not otherwise receive a copy of his appraisal, it was his responsibility to seek a copy, either from BIA or the Board, in time to enable him to present his case-in-chief in his opening brief. The only arguments properly before the Board in his appeal are those he raised in his opening brief and/or his earlier filings. 9/

The Board has considered those arguments, as well as the arguments of the other appellants, and finds that none of the appellants has shown that BIA's rental adjustment decisions were unreasonable.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

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8/ Tief also alleges that BIA failed to send him a copy of his appraisal. Like Snellman, he does not allege that he had ever requested a copy from BIA.
9/ The Board has considered Snellman's reply brief to the extent it responds to the Area Director's brief or relates to arguments raised in his earlier filings.